Supreme Court, U.S.
FILED

(1) 081485 MAY 12 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ * _____

Mrs.Carolyn Brown, Mrs.Deloise Fikes and
Mr.James Russell,

Petitioners,

v.

One Beacon Insurance Company, Inc.
A Foreign Corporation

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

_____ * _____

PETITION FOR A WRIT OF CERTIORARI

Mrs.Crolyn Brown et al., Pro Se
309 Burr Avenue
Talladega, Alabama 35160
(256) 362-9919

QUESTION PRESENTED

The primary issue in this case is whether One Beacon Insurance Company, Inc. A Foreign Corporation respondent breached their insurance contract by not making the full payment to replace petitioners' house, personal property and other living expenses back to a whole. **(GUARANTEED REPLACEMENT COST INSURANCE POLICY AT TODAY'S MARKET PRICE).** Property located at 141 Elbert Davis Street Talladega, Alabama 35160, **Policy # MZ-SM90474.**

Had One Beacon Insurance Company, Inc. paid petitioners' December 30, 2001 insurance claim in full and October 13, 2005 **Mediation Settlement Agreement** in full. The petitioners and other parties listed would not

be involved in this lawsuit today from December 30, 2001 to May 28, 2009. There was no jury trial for State or Federal Courts.

1. Petitioners, Mrs. Carolyn Brown, Mrs. Deloise Fikes and Mr. James Russell, asks the court to decide whether One Beacon Insurance Company, Inc. breached October 13, 2005 Mediation Settlement Agreement by not paying the full amount of the settlement. Mr. James Russell was not present and did not sign the agreement.
2. Petitioners, Mrs. Carolyn Brown, Mrs. Deloise Fikes and Mr. James Russell, asks the court to decide whether One Beacon Insurance Company, Inc. breached their contract

by not paying the full amount of the insurance policy coverage purchased by the petitioners; acted in bad faith by refusing to pay the full amount of the claim; committed fraud; acted fraudulently by making false representation as to the coverage afforded under the insurance policy Explanation of Payments name and policy number don't match insured.

3. Petitioner, Mr. Carolyn Brown, Mrs. Deloise Fikes and Mr. James Russell, asks the courts to decide whether or not Attorney Michael D. Petway properly and clearly identified himself as counsel of record for party represented, falsified court records as counsel of record for party

represented without petitioners knowledge nor permission; whether Michael D. Petway involvement with petitioners and his law partner Attorney George Courtney French created a conflict of interest between all parties.

4. Petitioners, Mrs. Carolyn Brown, Mrs. Deloise Fikes and Mr. James Russell, asks the court to decide whether Talladega Circuit Clerk Mr. Clearance Haynes, mishandled court documents, concealed two physical checks not included in The Court of Civil Appeals Completion of Records.

PARTIES TO THE PROCEEDING

The undersigned Petitioners /Pro Se hereby certifies that the following is a complete list of persons and entities that have an interest in the outcome of this case:

Armstrong Donna, Bishop Brandon Todd., Brown Carolyn, Carpenter Clark, Craig Christopher Edwards, Fielding, Honorable Jerry J., Fikes Deloise, Forshee & Turner Court Reports, Freeman Lauric, French George Courtney, Gaines Wolter & Kinney, Gill Patricia, Haynes Clarence, One Beacon Insurance Company , Petway Michael D., Roper Richard , Russell James, Talladega Insurance Agency Inc., Thornburg Melinda, Walker Barry W., Walls Michael B, Wolter Daniel.

TABLE OF CONTENT

Page

QUESTION PRESENTED. . . . . .i-iv

PARTES TO THE PROCEEDING v

TABLE OF CONTENTS . . . . . .vi-vii

CONTENTS OF APPENDIX. . . . . viii-x

TABLE OF AUTHORITY. x1

INTRODUCTION. 1, 5

JURISDICTION 5

CONSTITUTIONAL PROVISIONS &
STATUES INVOLVED 5-6

STATEMENT OF THE CASE
STATE COURTS 6-7

BREACHED OF CONTRACT 7-10

BAD FAITH 10-11

FRAUD, MISREPRESENTATION,
WANTONES 11-13

STATEMENT OF THE CASE
FEDERAL COURTS 13-15

NEW DICOVERY ISSUES 15

APPEARANCE OF COUNSEL
OF RECORD. 15-16

MEDIAITION HEARING & MEDIAITON
SETTLEMENT AGREEMENT 17-19

MISHANDLED COURT DOCUMENTS &
PHYSICAL CHECKS 19-20

REASON FOR GRANTING THE WRIT. 21-25

CONLUSION 26

CONTENTS OF APPENDIX
STATE COURTS

Appendix A.	May 23, 2007 Overruled or Denied, Talladega Circuit Court No: CV 2002-509 Honorable William E. Hollingsworth III.
Appendix B.	February 22, 2008, Affirmed: No Opinion, Alabama Civil Appeal No: 2060881, Honorable Judge Bryan
Appendix C.	May 9, 2008, Denied, Supreme Court of Alabama, No: 1070776, Honorable Woodall, J. Cobb, C.J., and see Smith, and parker, JJ. Concur

FEDERAL COURTS

Appendix A.	July 22, 2008 ordered, case Dismiss with Prejudice United State District Court Northern District of Alabama, No: CV-08-AR- 1008 S, Honorable William M. Acker, Jr.
Appendix B.	February 17, 2009, Affirmed, United State Court of Appeal for the Eleventh Circuit, No: 08-14775-GG, Honorable Birch, Hull and Wilson Circuit Judges.
Appendix C.	March 25, 2009, Rehearing Denied, U.S Court of

Appeal for the Eleventh Circuit, No: 08-14775-GG.

Honorable Birch, Hull and Wilson

Circuit Judges.

APPENDIX

District Court Order App.1-2

Court of Appeals. App.3-18

Order Denying Rehearing App.19-20

Transcript of motion hearing before the Honorable William M. Acker, Jr. United States District Judge CV08-1008-WMA July 18, 2008 . . . . .App.1-12

TABLE OF AUTHORITIES

Cases Page

Gardner v. Roberts, 565 So. 2d 638, 640 (Ala. C.V. App. 1990); Miles v. Miles, 99 So.318(Ala.1929) 23

Gray v. Holyoke Mutual Fire Co, 302 So. 2d 14,108 (Ala. 1974) 9

Masterson v. Phinizy, 56 Ala. 336 (1876); Brook v. Ward, 1254 So. 2d 175 (Ala. 1971) 8

Southerner Medical Health System, Inc. v. Vaughn, 669 So. 2d 98, 99 (Ala. 1995) 10

United Security Life Ins. Co. v. Dupree, 146 So. 2d 91 (1962) 8

INTRODUCTION

Petitioners purchased **(Guaranteed Replacement Cost Insurance Policy At Today's Market Price)** a homeowner policy from One Beacon Insurance Company, Inc. (A Foreign Corporation, doing business by agent in Jefferson County, Alabama) through its agent Talladega Insurance Agency for Petitioners home located at 141 Elbert Davis Street, Talladega, Alabama 35160. **Policy No: MZ-SM-90474.** Petitioners made timely payments, which were accepted by Respondent. On February 16, 2001, the Petitioners made a claim for damage to the home caused by a sever wind storm. The Respondent paid the claim for roof damage to the home in full.

On December 30, 2001 the Petitioners house and personal property within the home

were damage by fire. The house was declared a total loss. The Petitioners submitted a claim to One Beacon Insurance Company, Inc. for the damage caused by the fire. The Respondent failed to perform on the insurance policy by not paying the full claim made by the Petitioners, and the failure of the Respondent to pay the full claim has resulted in the Petitioners being unable to repair the house or replace the personal property loss in the fire that cause the damage to Petitioners home. Petitioners have incurred thousand of dollars in expenses as a result of the fire damage to there home and personal property contained therein. Respondent had a duty to pay for covered benefits.

*

Respondent refused to authorize full coverage for Petitioners in violation of the aforementioned policy thereby caused the Petitioners sever injury and hardship. Petitioner home, personal property and other living expenses have not been replaced to a whole as promised in the policy. Petitioners have become indebted to pay living expenses that should have been covered by the policy. Petitioner incurred unexpected costs and have suffered financially, mentally, physically and emotionally as a result of Respondent wrongful misconduct.

On May 25, 2005, Attorney G. Courtney French motion trial judge to join Mrs. Deloise Fikes as a party petitioner. On June 3, 2005 trial judge amended motion to join Mrs. Deliose Fikes as a party petitioner. The primary issue

in this case whether Respondent breached Petitioners insurance contract by not making a full payment to replace the home, personal property as well as other living expenses. Respondent acted in Bad Faith by refusing to pay the insurance claim in full. Respondent acted fraudulently by making false representation as to the coverage afforded under the policy at issue. The Respondent failed to perform on the policy contract by not paying the full insurance claim made by Petitioners. An insurance contract existed and was breached by the Respondent when failed to pay a legitimate claim made by the Petitioners. Respondent intentionally refused to pay claim, despite knowing a valid contract existed.

*

The Respondent had no legitimate reason for failing to pay the claim, particularity in light of the fact that a prior roof claim had been paid by the same Respondent to the same Petitioners under the same insurance policy.

*

JURISDICTION

The Court of Appeals entered its judgment on February 17, 2009. A Petition for Rehearing was denied on March 6, 2009. The jurisdiction of this court is under 28 U.S.C. § 1291.

*

CONSTITUTIONAL PROVISIONS & STAUTES INVOLVED

U.S. Const. Amend. I; U.S. Const. Amend. XIV Ala. Coded 6-5 -101(1975); Ala. Code 27-12-6(1975)

*

STATEMENT OF THE CASE STATE COURTS

The original case was filed July 29, 2002 in Talladega Circuit Court, Alabama Case No:CV-2002-509 Honorable Jerry Fielding trial judge, counsels of record attorney George Courtney French and attorney Barry . Walker. Petitioners purchased homeowners Insurances policy from One Beacon Insurance Company, Inc. through its agent, Talladega Insurance Agency for the home located at 141 Elbert Davis Street in Talladega, Alabama 35160. **(GUARANTEED REPLACEMENT COST INSURANCE POLICY AT TODAY'S MARKET PRICE).**

Policy No: MZ-SM-90474. Petitioners request a jury trial: Type **Breached of Insurance Contract, Bad faith, Fraud/Misrepresentation.** Attorney Barry Walker withdrawal from above case as counsel of record January 20, 2003 and attorney French withdrawal as counsel of record on July 31, 2006.

Second trial judge Honorable William E. Hollingsworth III. The Petitioners premiums were paid on time though the policy period of the insurance coverage. Payments were accepted by the Petitioners.

BREACH OF CONTRACT

One Beacon Insurance Company, Inc. breached their insurance contract by not paying the full amount of the claim. The Alabama Supreme Court has held that

following the destruction of insured premises, the insurance policy becomes a contract for the payment of money to the insured or personal representatives of the named insured. United Security Life Ins. Co. v. Dupree 146 So. 2d 91 (1962). The general rule is that an obligation to pay money to two or more persons, if not in the alternative, is joint, and case law in this State has held that payment to one of the obligees of the whole obligation will discharge the whole. Masterson v. Phinizy, 56 Ala. 336 (1876); Brooks v. Ward, 254 So. 2ds 175 (Ala. 1971).

The more specific rule regarding whether an obligation is, in reality, joint or several, is controlled by the intent of the parties at the time of the making of the contract.

Gray v. Holyoke Mutual Fire Ins. Co., 302 So. 2d 104, 108 (Ala. 1974). In Gray, the Court cited to the Common law rule, which says in part:

> In ascertaining the intention of the parties and in determining whether the rights and interest of covantees mare in reality joint or several, the subject matter of the contract, the language used, the purpose designed, the consideration furnished, and the circumstances that induced the making of the contract may be considered.

In order to established that a breach of contract has occurred, an Petitioner must prove: "(1) the existence of a valid contract binding the parties in the action, (2) his own performance under the contract, (3) the Respondent nonperformance, and (4) damages," Southern Medical Health Systems, Inc. v. Vaughn, 669 So. 2d 98, 99(Ala. 1995).

BAD FAITH

One Beacon Insurance Company Inc, acted in Bad Faith in their dealing by denying. Petitioners full coverage for fire damaged to dwelling and personal property as well as other living expenses. Respondent One Beacon Insurance Company, Inc., failed to perform on the contract by not paying the full claim made by the petitioner and failer of the Respondent to pay the full claim has resulted in the petitioner being unable to repair the residence or replace personal property. Respondent failed to pay legitimate claim made by the Petitioners, intentionally refused to pay the claim for fire damaged,

despite knowing a valid contract existed. Respondent had no legitimate reason for failing

to pay the claim, particularly in light of the fact that a prior claim had been paid by the same Respondent to the same Petitioners under the same policy. On February 16, 2001, not long before the fire damage to the residence on December 30, 2001, the residence suffered roof damage caused by a storm. The Petitioners made a claim so that the roof could be repaired. The Respondent paid the wind damage in full with no issues.

FRAUD; MISREPRESENTATION; WANTONESS

Respondent misrepresent petitioners by making false representation as to the coverage as afforded under the policy. The respondent admitted that the policy in questioned did provide coverage against loss due to fire.

Petitioner purchased a full coverage **(GUARANTEED REPLACEMENT COST INSURANCE POLICY AT TODAY'S MARKET PRICE).** The checks were insufficient to replace petitioner total loss. According to Ala. Code § 6-5-101 (1975): "Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal **fraud**." In addition, Ala. Code § 27-12-6 (1975) provides: "No person shall make or issue, or cause to be made or issued, any written or oral statement misrepresenting or making misleading incomplete comparisons as to the terms, conditions or benefits contained in any policy for the purpose of inducing, or attempting or tending to induce, the

policyholder to lapse, forfeit, surrender, retain, exchange or convert any insurance policy". Regardless of whether the representation is made willfully, recklessly, or mistakenly, four elements must be present:(1) there must be a false representation; (2) the false representation must concern a material existing fact; (3) the Petitioners must rely upon the false misrepresentation; and (4) the Petitioners must be damage as a proximate result.

STATEMENT OF THE CASE FEDERAL COURTS

On June 2, 2008 Mrs. Carolyn Brown, Mrs. Deloise Fikes and Mr. James Russell filed a lawsuit against One Insurance Company Inc., only. Petitioners purchased homeowners policy

from One Beacon Insurance Company, Inc. through its agency; Talladega Insurance agency for the home located at 141 Elbert Davis Street in Talladega, Alabama 35160.In the United States District Court Northern District of Alabama (Southern) Case No: CV-08-AR-1008-S trial judge Honorable William M. Acker, Jr. Petitioners requested a jury trail, Counsel of record Pro Se Mrs. Carolyn Brown, Mrs. Deloise Fikes and Mr. James Russell. Type: Breach of Mediation Agreement. New discovery issues, breached of insurance contract.

Petitioners requested a jury trial for both courts state and federal we never had a jury trial. Petitioners First Amendment and Fourteenth Amendment have been violated. The First Amendment to the United States

Constitution provides that "Congress shall make no law... abridging the freedom of speech... "The Fourteenth Amendment to the United States Constitution provides that nor shall any State deprive any person of life, liberty, or property, without due process of law..."

NEW DISCOVERY ISSUES

There have been several unresolved issues in this case since July 29, 2002 lawsuit was filed in both state and federal courts.

APPEARANCE OF COUNSEL OF RECORD

Petitioners Mrs. Carolyn Brown, Mrs. Deloise Fikes, and Mr. James Russell did not hire attorney Michael D. Petway as counsel of record. Petitioners only meet attorney Petway

once (See Laurie Freeman CCR-76 official court reporter). On July 12, 2005 unknown counsel Michael D. Petway motion the court to mediate above style case without notifying petitioners and without our permission. On July 14, 2005 attorney Michael D. Petway entered his name as counsel of record without petitioners knowledge.

On May 16, 2007 attorney Michael D. Petway represented attorney George C. French his **law partner** in a court hearing against petitioners. Attorney Petway stated "this was his first time meeting the petitioners". Petitioners were not aware of the above issues until we became Pro Se in July 2006.

MEDIATION HEARING AND MEDIATION SETTLEMENT AGREEMENT

On October 13, 2005 a mediation hearing was held. The hearing started at 8:30am and ended at 6:30pm nonstop. Present at the mediation hearing was petitioners Mrs. Carolyn Brown, Mrs. Deloise Fikes, attorney George French, Michael B. Walls and One Beacon Insurance Company. Petitioners did not know Talladega Insurance Agency was present at the mediation hearing until petitioners receive settlement agreement.

On October 13, 2005 a settlement was reach $100,000.00 between One Beacon Insurance and petitioners Mrs. Carlyon Brown and Mrs. .Deloise Fikes Mr. James Russell was not present. More than sixty days later petitioners received settlement agreement for

$92,500.00 petitioners refused to sign agreement. Petitioners received second settlement agreement from Talladega Insurance Agency for $7,500.00 petitioners refused to sign agreement due to the fact petitioners did not know Talladega Insurance Agency was presented at the mediation hearing and One Beacon failed to pay the mediation settlement in full as promised. (See One Beacon Insurance check paid in full for $92,500.00 and $7,500.00 check paid by 'WestPoint Insurance Company (unknown company) was not a party to the case.

One Beacon Insurance failed to pay October 13, 2005 mediation Agreement Settlement in full. October 13, 2005 mediation settlement agreement was not consternated by the trial judge. On May 30, 2006 petitioners

motion trial judge to withdraw the respondent motion to enforce mediation settlement. On June 13, 2006, petitioners motion trial judge not to interplead settlement funds attorney fees, and expenses. One Beacon Insurance breached mediation settlement agreement by not paying the full settlement amount.

MISHANDELED COURT DOCUMENTS AND CHECKS

One Beacon Insurance Company, Inc. failed to disclosed two physical check filed n Talladega Circuit Court paid by One Beacon Insurance Company, Inc.(1) November 16, 2006 batch: 2007036 for $16,371.77. (2) March 21, 2007 batch: 2007129 for $12,581.00. One Beacon Insurance Company Inc. and Talladega Circuit Court concealed checks and other court documents from the Petitioners the public,

Civil Court of Appeals and State and Federal Courts. The State and Federal Courts was informed about above checks and new discovery issues they ignored the facts, issues the evidences exhibits and points of law as a whole.

Petitioners motion Alabama Civil Court of Appeals to compel Talladega Circuit Clerk Mr. Clearance Haynes to produces missing documents not included in June 28, 2007 completion of clerk record. No physical checks were produced. One Beacon Insurance Company, Inc. failed to answer Petitioners June 6, 2008, complaint instead motion the trial judge to dismiss the case. Respondent failed to follow Federal Court Procedures (Respondent defaulted). The trial judge ruling was unjustified.

REASON FOR GRANDING THE WRIT

Petitioners Mrs. Carolyn Brown, Mrs. Deloise Fikes, and Mr. James Russell believe a Petition for a Writ of Certiorari should be granted because of One Beacon Insurance Company unfair business practice.

All insurance policies or "Contracts" between the insurance company and the person who pays for the policy. Respondent is required to treat its insured with "Good Faith and Fair Dealing" when a claim is made. One Beacon Insurance Company failed to pay petitioners **(Guaranteed Replacement Cost Insurance Policy At Today's Market Price)** and October 13, 2005 mediation settlement agreement in full.

One Beacon Insurance Company Inc. failed to perform on the insurance claim by not paying the full claim to the Petitioners. The Respondent had no legitimate reason for failing to pay the claim, due to the fact that a prior claim had been paid by the same Respondent to the same Petitioners under the same insurance policy, not long before the fire damage to the residence on December 30, 2001.

As a proximate result of One Beacon Insurance Company, Inc. breached of contracts, bad faith, fraud, misrepresentation; wantonness Mrs. Carolyn Brown, Mrs. Deloise Fikes and Mr. James Russell were injured and damaged. Respondent have not replace Petitioners home, personal property and other living expenses to a whole as promised in the policy. Petitioners have become indebted to pay

living expenses that should have been covered by their policy of insurance, incurred unexpected costs. Suffered, mentally, emotional, physical, and financially.

Alabama Courts have held that whether the proceeds from an insurance policy taken out by one cotenant as the sole owner for its full value, who has paid the premiums thereon, the other cotenant(s) not being a part of the insurance agreement, will insure to the benefit of all cotenant turns on the equities of the case. Gardner v. Roberts, 565 So. 2d 638, 640 (Ala.CIV. APP. 1990), Miles v. Miles, 99 So. 318 (Ala. 1929).

Everything that has happen from December 30, 2001 to May 12, 2009 is because One Beacon Insurance Company, Inc. did not pay Petitioners **(GUARANTEE**

REPLACEMENT COST INSURANCE POLICY IN FULL AT TODAY'S MARKET PRICE.) Had One Beacon Insurance Company, Inc. paid Petitioners insurance contract in full and Mediation Settlement Agreement in full we would not have been placed in this position to defend ourselves, as well as all other parties that was involved.

Petitioners pray this Honorable Court to compel Respondent One Beacon Insurance Company, Inc. to replace Petitioners home, contents and living expenses back to a whole **(At Today's Market Price).** Petitioners believe we should be awarded for **what we have paid for; work for; and suffered for,** because of the Respondent One Beacon Insurance Company, Inc.unfair business ethics, where they have in bad behavior denied the existence of a binding

agreement with the Petitioners. Respondent acted without a reasonable belief in their position when they denied the Petitioners request for full insurance coverage. Respondent One Beacon Insurance Company, Inc. bad behavior includes the following: (1) **Malicious Intent** (i.e. desire to cause harm), (2) **Gross Negligence** (i.e. conscious indifference.) or (3) **A willful disregard for the right of others.** "EVERYTHING KNOWN TO MAN IS WRONG IN THIS CASE" Wherefore premises considered Petitioners prays for a judgment in its favor, award unspecified compensatory damages punitive damages taxing cost of this case plus interest to the Respondent One Beacon Insurance Company, Inc. A Foreign Corporation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 27, 2009.

Respectfully submitted,

Mrs. Carolyn Brown Pro Se
309 Burr Avenue
Talladega, Alabama 35160
(256) 362-9919

Mrs. Deloise Fikes Pro Se
1224 Dugan Avenue
Birmingham, Alabama 35214
(205) 798-5189

Mr. James Russell Pro Se
309 Burr Avenue
Talladega, Alabama 35160
(256) 362-9919

FILED

2008 Jul-22 PM 12:31
U.S.DISTRICT COURT
N.D.OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Carolyn Brown, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	08-AR-1008-S
	)	
ONE BEACON INSURANCE COMPANY, INC,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in defendant's motion to dismiss and for the reasons articulated by the court during the hearing of defendant's said motion on July

18, 2008, the motion is well taken, and is GRANTED. Accordingly, the above-entitled action by Carolyn Brown, Deloise Fikes, and James Russell is DISMISSED WITH PREJUDICE.

Costs are taxed against plaintiffs.

Done this 22nd day of July, 2008.

"s/": William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-14775
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEBRUARY 17, 2009
THOMAS K. KAHN
CLERK

D.C. Docket No.08-01008-CV-AR-S

CAROLYN BROWN,
DELOISE R. FIKES,
JAMES RUSSELL,

Plaintiffs – Appellants,

versus

ONE BEACON INSURANCE COMPANY INC.,
a foreign corporation,

Defendant – Appellee.

Appeal from the United States District Court for the Northern District of Alabama

---

(February 17, 2009)

Before BIRCH, HULL and WILSON, Circuit Judges.

PER CURIAM:

Carolyn Brown, James Russell, and Deloise Fikes (collectively, "Insured"), 1 proceeding pro se, appeal the district court's dismissal of their complaint for breach of an insurance contract. They argue that the district court should have considered the merits of

their claims against One Beacon Insurance Company ("One Beacon") instead of dismissing their complaint as barred by the doctrine of res judicata.

I.

We review de novo the dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b) (6). Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003). We may affirm a dismissal "on any grounds supported in the record." See *Kozara v. City of Casselberry*, 392 F.3d 1302, 1306 n.2

(11th Cir.2004).

---

1 Brown and Russell did not personally sign the complaint filed with the district court. The parties did not raise this issue on appeal. Every pleading must be signed by either an attorney of record by a party personally, if the party is unrepresented. See FED. R. CIV. P. 11 (a). "[T]he requirements of the rules of procedure should be liberally construed," however, and "mere technicalities' should not stand in the way of consideration of a case on the merits." Torres v. Oakland Scavenger Co., 487 U.S. 312,315,108 S. Ct. 2405, 2408 (1988). This applies to situations where "a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule. . . [but is nevertheless] the functional equivalent of what the rule requires." Id. at 316-17, 108 S.Ct. at 2408. In light of the plaintiff's pro se status, Brown's appearance before the district court in support of the complaint, and the filing of a post – judgment motion properly signed by Brown and Russell referencing the signature dispute, we deem Brown and Russell to have cured their failure to sign the complaint in the first instance and confirm their status as plaintiffs- and now appellants –in the action.

Dismissal is appropriate if, when accepting the plaintiff's factual allegations as true, "the plaintiff

can prove no set f facts that would support the claims in the complaint." Davila, 326 F.3d at 1185. "Generally, the existence of an affirmative defense will not support at motion to dismiss." Quiller v. Barclays American/ Credit, Inc., 727 F.2d 1067, 1069 (11th Cir.1984), en banc reh'g, 764 F.2d 1400, 1400 (11th Cir. 1985) (per curiam) (reinstating panel opinion)."Nevertheless, a complaint may be dismissed under Rule 12 (b) (6) when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint." Id. When determining a motion to dismiss, a court may consider the complaint, its attachments, and documents attached to the

defendant's motion to dismiss if the attached documents are central to the plaintiff's claims and referred to by the plaintiff without converting the motion for summary judgment. Brooks v. Blue Cross & Blue Shield of Fla., Inc 116 F.3d 1364, 1368-69 (11th Cir. 1997) (per curiam). We also review res judicata determinations de novo. Jang v. United Techs. Corp., 206 F.3d 1147, 1149 (11th Cir. 2000). Although pro se pleading are liberally construed, "this leniency does not give a court license to serve as de facto counsel for a party or to rewrite an otherwise deficient pleading in order to sustain an action. . ." GJR Invs., Inc. v. County of Escambia, Fla., 132 F. 3d 1359, 1369 (11th Cir. 1998) (citations omitted).

In a diversity case, federal courts will "give preclusive effect to the judgment of a state court provided that two conditions are met: first, that the courts of the state from which the judgment emerged would do so themselves; and second, that the litigants had a full and fair opportunity to litigate their claims and the prior state proceeding otherwise satisfied the applicable requirements of due process."Shields v. Bellsouth Adver. & Publ'g Co., Inc., 228 F. 3d 1284, 1288 (11th Cir. 2000) (internal quotation marks and citations omitted).

"Res judicata and collateral estoppel . . . are two separate rules or sets of rules for determining the conclusiveness of judgments." Wheeler v. First Alabama Bank of Birmingham, 364

So. 2d 1190, 1199 (Ala. 1978). "Under Alabama law, the essential elements of res judicata are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits." Wesch v. Folsom, 6 F. 3d 1465, 1471 (11th Cir. 1993); see also Wheeler, 364 So. 2d at 1199 (state supreme court case stating elements of res judicata). "If these elements are present, then the former judgment is an absolute bar to any subsequent suit on the same cause of action, including any issue which was or could have been litigated in the prior action."

Wheeler, 364 So. 2d at 1199.

"Collateral estoppel operates where the subsequence suit between the same parties is not on the same cause of action. " Id. Collateral estoppel requires that: (1) the issue be identical to one the issue involved in pervious suit; (2) the issue be actually litigated in prior action; and (3) the resolution of the issue be necessary to the prior judgment. Id. "If these elements are present, the prior judgment is conclusive as to those issue actually determined in the prior suit." Id.

"[R]es judicata is an affirmative defense..." Norfolk S. Corp. v. Chevron, U.S.A., Inc,. 371 F. 3d 1285, 1289 (11th Cir. 2004). The doctrine of res

judicata in conjunction with 28 U.S.C. §. 1783, the Full Faith and Credit Statue, bars relitigation of matters that were previously litigated in a prior state suit. Saboff v. St. John's River Water Mgmt. Dist., 200.3d 1356, 1359 (11th Cir. 200). Section 1738 requires "a federal court must give a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City Sch. Dist. Bd. Of Educ., 465 U.S. 75, 81, 104, S. Ct. 892, 896 (1984). Thus, the "relevant inquiry is whether [Alabama's] law of res judicata would ordinarily bar [the plaintiffs'] subsequent federal claim [ ]". Saboff, 200 F.3d at 1360.

When the parties "consent" to the dismissal of a suit "based on the settlement agreement . . . . . the principles of res judicata apply (in a somewhat modified form) to the matters specified in the settlement agreement, rather than the original complaint." Norfolk, 371 F. 3d at 1288. "In determining the res judicata effect of an order of dismissal based upon a settlement agreement, [the court] should also attempt to effectuate the parties' intent. The best evidence of that intent is, of course, the settlement agreement itself." Id. At 1289. Ultimately, Alabama law does give judgments approving settlements conclusive and binding effect.

See ALA. CODE: 25-5-56; see also Lawrence v. U.S. Fidelity & Guar. Co., 145 So. 577 (Ala 1933) (holding that judgments approving settlements may be given res judicata effected).

Alabama uses the substantial evidence test to determine whether two causes of action are the same for res judicata purposes. Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 637 (Ala. 1998). Under this test, res judicata applies when the same evidence substantially supports both actions. Id.

As the Supreme Court of Alabama has explained:

> it is well-settled that the principal test for comparing causes of action [for the application of res judicata] is whether the primary right and duty or wrong are the same in each action. Res judicata applies not only to the exact legal theories advanced in the prior case, but to all legal theories and claims arising out of the same nucleus of operative facts.

Old Republic Ins. Co. v. Lanier, 790 So. 2d 922, 928 (Ala.2000) (emphasis added) (internal quotation marks and citations omitted).

Here, the Insured filed in claim in state court against One Beacon for breach of contract. The parties mediated their claims, and in 2005, One Beacon settled with the Insured. Subsequently, the Insured alleged to the state trial court that One Beacon had failed to pay full amount required by the mediation settlement agreement. However, the state trail court enforce the agreement against the Insured, terminating the litigation. The Insured were unsuccessful in their appeal to the Alabama Court of Appeals.

The Insured then brought suit against One Beacon in federal court. In their federal complaint, the Insured request compensation for their destroyed home and furnishings and for living expenses incurred, as well as for One Beacon's malicious, grossly negligent, and willful breach of their insurance contract. Because the Insured have fully litigated these claims in state court, their federal complaint s barred by res judicata.

The Insured's complaint demonstrates that their federal action involves the same parties and causes of action that were fully and previously resolved by the state court of competent jurisdiction. The district court properly dismissed the action under

Rule 12(b) (6) as barred by the doctrine of res judicata in accord with Alabama law. See Saboff, 200 F.3d at 1359. Moreover, to the extent the cause of action in state court action differed from any cause of action which could be liberally construed as underlying the present case (e.g., breach of the state court settlement agreement), collateral estoppels applied to preclude relitigation of whether the settlement agreement was binding and should be enforced, and warranted dismissal on that basis. See Wheeler, 364 So.2d at 1199.

CONCLUSION

Upon review of the record and the partes' briefs, we discern no reversible error. Accordingly, we affirm.

AFFIRMED.

IN THE UNITED STATES COUT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAR 25, 2009

THOMAS K. KAHN
CLERK

No. 08-14775-GG

CAROLYN BROWN,

DELOISE R. FIKES,

JAMES RUSSELL,

Plaintiffs – Appellants,

versus

ONE BEACON INSURANCE COMPANY INC,

a foreign corporation,

Defendant – Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

---

Before: BIRCH, HULL and WILSON, CIRCUIT Judges.

PER CURIAM:

The petition (s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

"s/": _____

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DIDSTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BROWN, et al.,	*	
	*	
Plaintiffs,	*	CV08-1008-WMA
vs.	*	July 18, 2008
ONE BEACON INSURANCE	*	Birmingham, Alabama
COMPANY, INC.	*	9:15 a.m.
	*	
Defendant,		

****

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE WILLIAM M. ACKER,
JR. UNITED STATES DISTRICT JUDGE

FOR THE PLAINTIFFS:
MS. DELOISE FIKES, PRO SE
MS. CAROLYN BROWN, PRO SE

FOR THE DEFENDANT:
MS. LYNN HARE PHILLIPS, ESQ.
HARE, CLEMENT & DUCK
Financial, Center Suite 1010
505 North 20th Street
Birmingham, AL 35203
205-322-3040

CHERYL K. POWELL, CCR, RPR, FCRR
Federal Official Court Reporter
1729 Fifth Avenue, North
Birmingham, Al 35203
256-508-405/wrd4wrdrpr@aol.com

PROCEEDINGS

THE COURT: Brown and others against One Beacon Insurance Company. Anybody here on that? We've got pro se plaintiffs here, Carolyn Brown, Deloise Fikes, and James Russell. Are any of those three here? Two of them? So Carolyn Brown is here and Deloise Fikes is here.

MS. FIKES: Correct.

THE COURT: Mr. Russell is not here.

MS. FIKES: Correct.

THE COURT: And the defendant, One Beacon, by Lynn Hare Phillips is here.

MS. PHILLIPS: Yes, sir.

THE COURT: The pro se complaint, ladies, that you've filed and that Mr. Russell filed has handwritten names at the bottom of it. They're strongly that one person wrote the signatures of all

three of you. And there's no lawyer in this case.

And a non lawyer can't represent another person

I think it's likely and almost virtually impossible to contradict that one of you – – I don't know who it was – –signed the names for all of you. And one of them is your actual signature, and two of them are by somebody else. And a pro se plaintiff can't file a case by somebody else signing the name or purporting to represent him. Either of you ladies want to tell me which of those three, Brown, Fikes, or Russell, signed those signatures? Do you know?

MS. FIKES: Yes.

THE COURT: Ma'am?

MS. FIKES: I can answer that question.

THE COURT: You are Brown?

MS. FIKES: I'm Deloise Fikes.

I'm--

THE COURT: You're not a lawyer, are you?

MS. FIKES: No, sir, I'm not.

THE COURT: Your complaint reads more like a malpractice claim against your former lawyers than a claim against One Beacon Insurance Company. You're basically saying that you got snookered and mistreated by what happen to you in a Talladega County Circuit Court, largely because your lawyers didn't perform at the level you think they should have. They're not defendants here. You're suing the same entity that you sued with them as your lawyers in the Talladega Circuit Court. And you're unhappy with the result there.

I'm not saying whether you should be unhappy or should be happy about it. And I don't even know, for instance, whether any checks that were written to

you as a result of that mediation and judgment based on it were cashed. That might be an interesting thing to explore if we got that far.

But this defendant has asserted – – and incidentally, your complaint tells me about the Talladega Circuit Court proceeding. So it didn't take the defendant to point that out to me. You pointed it out to me. And the defendant here is pointing out all over again that that case is over. That case reached a conclusion. That case attempted to go all the way to the Supreme Court of Alabama, unsuccessfully from your point of view.

And when the defendant here tells me that on the very face of the complaint, you barred by having had your one bite at the apple, you don't get two. It's entitled to a dismissal.

It's just that simple.

I don't know whether you've talked to a lawyer, another lawyer other than the lawyers you had and you are unhappy with. **But there's everything known to man wrong with your case – here. I don't think that if you, you know, resurrected Clarence Darrell to represent you that anything could be done for you. I don't know if you know who Clarence Darrell is.** He was a pretty good lawyer at one time. But you just couldn't – – you can't get by this. Not the way you're doing it.

Now, if you want to sue your lawyers, I'm not telling you you should. I'm not telling you you could. I'm telling you that's what you're complaining about in here. And you can't see all that aside – – bad, good, or indifferent – – and sue the same company

Now, Lynn, have I stole your thunder? I apologize.

MS. PHILLIPS: No, sir.

THE COURT: That's where we are. There's no point in you having to sit here and listen to other lawyers or lawyers talk about other cases because unless you want to sit here and enjoy the morning, I think there's just nothing I can do for you.

MS. FIKES: Your Honor, we sued One Beacon. We did not include the other parties in our complaint. We only sued One Beacon. In the old case, all parties was included. But in this particular, we only filed in the federal court – – it was only pertaining to One Beacon. So we did not bring in all the baggage that was in the state courts. Attorney Lynn Hare did.

THE COURT: Do you want to respond to that, Ms. Phillips?

MS. PHILLIPS: Just to say what you said, Judge. It doesn't matter. The same defendant,

same parties, same claims, everything exactly the same with respect to my client.

THE COURT: Well, it may not be exactly the same. But they're almost exactly the same.

MS. FIKES: Your Honor, the only thing the same was the charges. Anything else, the defendant included in there. She didn't even answer the complaint. Instead, she motioned all the baggage that was in the state court.

THE COURT: Have you talked to a lawyer about this case? About the case you've filed here? Have you run this by a lawyer? You're not a lawyer. And you're speaking for yourself. And I understand why a non lawyer would think like you're thinking. But think a lawyer who knows the principle of what she calls res judicata and which you've never heard of until now stops you in this case. **Stops you flat.**

MS. FIKES: Your Honor, since we are in the old case, then it's – – we didn't include it in your – – in our complaint in the federal courts that there was – – yes. We went from the circuit to the appellate to the supreme court. In those courts, there was trouble. And a lot of situation went on such as incompletion of the record.

THE COURT: I don't want to stop you, but there's no point in your – – I've already reiterated that. I know you've been in those courts. **And I know you had trouble.**

MS. FIKES: But did you see the incompletion of the record?

THE COURT: **I know you had trouble. I can't help you get out of that trouble.** There's no way that this case can proceed under the circumstances. Just no way.

Now, if you don't like what I'm doing, you can go to the 11th Circuit Court of Appeals like you went the Supreme Court of Alabama. I f you want to. But you'll get about as far as you got there, I think. Or maybe not as far. But that's for you to decide.

As of now, I have looked at the papers here. And I'm satisfied that on the papers, you're stopped. And I'm going to uphold that. And I think that even if the case weren't barred by res judicata, I'd have to stop two of you because you haven't filed anything because you're not a lawyer. You can represent yourself. And you signed your name to it and so you might have – – you might even be in court. But the other two, without a signature on a complaint and not being lawyers and you not being a lawyer, they're not even here to even be allowed to say anything. And you've said something. But it really didn't get you anywhere.

So I'm going to move on to the next case and thank you for being here.

MS. PHILLIPS: Thank you, Judge

(Proceeding concluded at approximately 9: 25 a.m. on July 18, 2008.)

CERTIFICATE

STATE OF ALABAMA)

COUNTY OF MADISON)

I, the undersigned, hereby certify that the foregoing pages contain a true and correct transcript of the aforementioned proceedings as is hereinabove set out, as the same was taken down by me in stenotype and later transcribed utilizing computer- aided transcription.

This is the 4th day of September of 2008.

"s/": Cheryl R. Powell

Cheryl Renae King Powell, CCR, RPR, FCRR

Federal Certified Real time Court Reporter

ACCR# 349

CHERYL K. POWELL, CCR, RPR, FCRR
Federal Official Court Reporter
1729 Fifth Avenue, North
Birmingham, Al 35203
256-508-405/wrd4wrdrpr@aol.com